No. 7876

United States
Circuit Court of Appeals
For the Ninth Circuit 4

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of the Estate of Nick Wagner, Deceased,

Appellee.

BRIEF OF APPELLEE

THOMAS C. COLTON
of Wibaux, Mont.
H. LOWNDES MAURY
of Butte, Mont.
Attorneys for Appelee.

Upon Appeal from the District Court of the United States for the District of Montana.

McKEE PRINTING CO., BUTTE, MONT.

No. 7876

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of the Estate of Nick Wagner, Deceased,

Appellee.

BRIEF OF APPELLEE

THOMAS C. COLTON
of Wibaux, Mont.
H. LOWNDES MAURY
of Butte, Mont.
Attorneys for Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

TOPICAL INDEX

TOPICAL INDEX—Continued

Page

TABLE OF CASES CITED

TEXT BOOKS CITED

STATUTES CITED

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of the Estate of Nick Wagner, Deceased,

Appellee.

BRIEF OF APPELLEE

ARUGMENT AND AUTHORITIES

I.

Preface.

Every effort has been made in Appellant's brief to confuse the court as to the state of the evidence. Effort will be made chiefly to clarify the case of these exaggerations and partial, even untrue, statements in

the Appellant's brief. Part of this confusion arises, perhaps, not from an intent on the part of the writer of the Railway's brief to deceive. He often boasts in oral argument that he has no knowledge of even the simplest laws of hydraulics, mechanics, or erosion. This leads him to place a line of maximum flow in a plat, annexed to his brief, straight over a hill instead of around the channel of the creek. He would have the Court believe that with a channel straight away to the west *offering the least resistance,* the water, sua sponte, forsook this channel, rose bodily, advanced north over the right bank in a depth of 14½ feet, and assaulted the town wherein plaintiff's property was situated several feet above ground level in clothing shelves in his store. This leads counsel to draw a little tributary stream north of the railroad bridge as if entering the main stream at a right angle in sandy soil. Of course, there can be no such phenomenon unless controlled by man either by wall on the ground or plat in a court house. This leads him to evoke evidence of witnesses that a wall of water was seen going into the town where the high water marks found afterwards by engineers were all in plane, a table, a level surface. None was ever found an inch out of plane *upstream* of the embankment. In the embankment before it broke down there were two high levels *downstream* because there was a second opening, the viaduct 11 feet higher than the bridge opening bottom level. Thus is he led into the absurdity of actually thinking that when a stream is high the water *flows faster* across country than

in the depth of a channel where the least resistance is offered. Perhaps he actually believes that a stream 11.3 feet high, 600 feet wide, without addition of rain or tributaries may in a 2250 foot run, on similar grade, spread to a width of 2650 feet, rise to a depth of 23 feet from the bottom of the creek or 20 feet above low water, *without obstruction.*

To the untrained mind, the fact that a sucking colt stood through the flood on about the line of appellant's asserted maximum flow on the brief plat, would show that the flood did not run up over the right bank 14 feet deep. But to a mind giving only slight heed to natural phenomena such fact adds nothing to conviction. Without it, a rational mind knows that it did not happen. Of course, the studious mind *knows* that the carrying power of water, i. e., force of running water, varies with the 6th power of the velocity: i. e., a stream going 10 miles an hour has a million times the force of one going one mile an hour. R. P. 327. That if 1/100 part of the testimony of the railway's wall of water witnesses had been the fact, timbers would have been splintered, pipes contorted, brick buildings demolished, railroad embankment eliminated, all in one rush of water. There is testimony in this record of one Lillis, an engineer for the railroad, that though south of the embankment the water stood 10 feet higher than it did immediately north, the embankment was not obstructive, that "the houses in the town dammed up the water."

The ordinary mind has such trust in the adjustments of nature as to believe that, excluding tributaries and

rainfall and sudden meltings, if houses on a bench upstream are not affected by a particular flood, houses below on a similar or higher bench will not be affected unless there be artificial obstruction. In fact, the further down the stream the less likelihood of damage to property on the same bench.

To the proof that the railroad embankment was *the proximate cause* of the rise of the water over Wagner's property, the mere fact that Massey's house, first upstream on the same bench escaped, though the channel was much narrower, Burke's house, second upstream similarly escaped, Parker's house, third upstream similarly escaped, makes more than a prima facie case, makes more than a preponderance, makes more than a moral certainty, makes such a sense of conviction, that in a civil case a rational judge would not permit a jury to find the contrary. The average of human intelligence has risen above belief in magic. Barrels do not float upstream with walls of water coming down. Methodist parsonages, whatever the belief of the unfortunately drowned occupant of this one may have been in present day miracles, in mad rushes of water do not rise up gently and float east to the centre then down stream a bit then off westward and light away from the bridge on the embankment, unless the embankment is obstructing.

In the Salton Sea Cases, 172 Fed. p. 819, it is held:

> "The fact that an extraordinary flood came down the river contributing to the disaster does not relieve the defendant from responsibility. Under the conditions prevailing in that locality and known to have existed for many years, it was the duty of the

defendant to have maintained proper control of the water at its headgates."

"No one is responsible for that which is merely the Act of God or inevitable accident. But when human agency is combined with it, and neglect occurs in the employment of such agency, a liability for damages results from such neglect. Such is the rule laid down and applied in Polack v. Pioche, 35 Calif. 416, 95 Am. Dec. 115. The expression "Act of God" excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to be the Act of God, but must be regarded as the act of man. The evidence shows conclusively that it was defendant's method of constructing the intakes that resulted in turning the flood of the Colorado river into Salton Sink. The floods of this river in 1905 and 1906 were great but no greater than would have been anticipated by the prudent person in view of all the conditions and history of that river."

Much of the argument of the Railway's brief is answered by a glance at its exceptions to the charge (R. P. 820-821). The only complaint of the charge was of the use by the court of the word "culpable" before "negligent act." In this connection, the use of this word was more favorable to defendant than to plaintiff. It was merely a pleonasm. This word in instruction in Montana originated in Mulrone v. Marshall, 35 Mont. 238, 88 Pac. 797. Interesting also as asserting liability when a contractor negligently left a drain bank worn down, an unprecedented rain storm flooded plaintiff's cellar. It answers much argument about liability depending on whether the railway must have previously damaged Wagner's property before it could be held liable for this

injury. Marshall's drain had never flooded Mulrone's cellar before the time recovered for.

Nothing in the exception criticises definitely any part of the charge except that the court adverts to the complaint stating culpable negligent acts of defendant. The exception is not comprehensive of any other point of law, such as segregation of damage, proximate cause, anticipation of injury to plaintiff, liability for concurrence of negligent act of defendant with Act of God. No complaint appears there of failure to charge that a defendant is not liable if good engineers are employed, etc.

We do not contend that the copy of the report of government engineers was not properly authenticated. The original document itself was not admissable. The copy was offered as a whole. If there were anything relevent in it, this was not separated for the court by defendant. If there was material matter in it such was not sifted out. As we remember the document, it had 50 or 60 pages of fine print and a contour map showing impossibilities in nature, i. e. contour lines of water levels *intersecting each other.* It had no more of competency about it, than a report to a Senate Committee, or a proclamation of the governor of Montana that the railway was liable here would have had. In order to enable this court to pass completely and readily on this assignment of error, the evidence rejected should be inserted in brief totidem verbis, or at least as much of it as is thought to be material by the party charging error. The rule in point is not obeyed in the Specifications of Error.

2.

Prior Floods.

The evidence conclusively shows that the bridge impeded the flow of the water that came down Beaver Creek in ordinary recurring high waters before 1929. The opening at the bridge, according to Appellant's bridge records, was completely filled with water in the 1900 flood (R. p. 603, 289); it was almost filled in the 1921 flood (R. p. 119); railroad track of Appellant was washed out then from about one mile east of Wibaux to Hodges (about 10 miles) (R. p. 47); Mrs. O'Keefe, as a child, couldn't get to school from the Davis Addition on account of high water in the spring of the year (R. p. 71); there was more water in the Davis Addition in 1921 than in 1929 (R. p. 73); Senator Kinney testified about water backing up in the Davis Addition (R. p. 252); people were rescued out of the high water in the Davis Addition during the 1921 flood (R. p. 75, 127); prior to 1929 merchants had flood windows in their basements to keep out the water, but Sherman testified that since 1929 the water has never gotten into his basement (R. p. 80); witnesses testified as to the condition at the bridge during the 1921 flood (R. p. 119, 128); during times of high water in Wibaux, the water was always higher on the south side of the embankment than on the north side (R. p. 120, 245); grain in the elevator was damaged by backed-up water (R. p. 50); the part of the town of Wibaux south of the embankment was covered with water with the exception of a block and a half on Main

Street in the 1921 flood (R. p. 118, 155); ice blocks floated in all directions during break-ups (R. p. 120, 49).

> "At the height of flood waters, it was customary for the water to come in from the south and meet with the resistances at the railroad embankment and back up to the south of the town again and swinging around in a horseshoe fashion, coming in on the west and meeting the current coming from the railroad bridge on the east and damming itself up at the viaduct, which appeared to be too small for a spillway." (R. p. 105-106) (See also R. p. 120).

During the 1921 flood track was washed out 3 or 4 places between Wibaux and Yates (R. p. 130); in the 1921 flood there was a washout right at the east end of the bridge (R. p. 129).

> "The damage that flood did to the railroad embankment to the east of the bridge, there was a considerable washout on the east embankment close to the east pier, which was afterwards—they hauled rock and dirt and filled in, because it was washed out so much that the railroad was unsafe, I should judge. I never was there to measure that, but I know there was considerable new work put in there soon after the flood of 1921; they riprapped it quite a lot higher than it was before at that time." (R. p. 85).

An engine was derailed east of the bridge in the 1921 flood (R. p. 130); tracks were washed clean out into the highway east of Wibaux in that flood (R. p. 130); in 1921 the water was up to Sutherland's knees in his barn opposite Woodman's Hall (R. p. 164-165); water in the south end of Wibaux County washed out bridges in 1925

(R. p. 348, 354, 754); in the 1921 flood water was in Drake's livery stable about 2½ feet deep (R. p. 95).

> "The highest water mark that I was shown at Lentz's, 800 feet to the north of the fill, before the 1929 flood, was for the 1921 flood and it was 8.2 feet above the bottom of the channel under the bridge. The correspondence that I would draw as an engineer, between that water mark at Lentz's and water going over the elevator track or going around over Second Avenue and down stream, explaining,—will state that the water never having been over that stage at Lentz's and considerable testimony at different times showing it having been through the swale and over the elevator tracks would indicate that several times at least, there had been a back-up of water at the bridge.
>
> Q. Would that indicate to you as an engineer, that whenever there had been a back-up around through the swale or over the elevator tracks, if that testimony was correct, that there was obliged to have been a back-up?
>
> A. Absolutely." (R. p. 298).

Counsel for the appellant says that the 1921 flood fell on the east and west hills of Wibaux. Miss Jones testified that there was more water at her place, 2½ miles south of Wibaux, in 1921 than there was in 1929, that this water all flowed into Beaver Creek (R. p. 461). Brophy, a witness for Appellant, said that it rained 8 or 9 inches one afternoon at his place in 1921 (R. p. 395); Brophy lives six miles south of Wibaux. Mrs. Edighoffer testified that in 1921 the water was up on the floor of the building on First Avenue southwest of the county bridge; and that "When he raised the door up, the water come in and spread over" (R. p. 454). In order

for the water to get up that high, it had to be 15 feet above the bottom of the creek. Charles E. White said that in 1921 water came right across First Avenue South into his basement (R. p. 103). Webber saw a foot to 16 inches of water go down the swale in 1923 and 1924 (R. p. 232). The water was deeper in the Davis Addition right within the water-shed of Beaver Creek Valley within plain sight of Appellant's depot and line in 1921 than it was in 1929, and certainly was notice to Appellant of what it might expect.

Appellant charges itself with such notice of these floods in its answer:

> "That ever since 1881, the defendant company and its predecessors in interest, have been familiar with the rainfall, drainage area, and the physical conditions of said Beaver Creek, and Beaver Creek valley south of said railroad track." (R. p. 32-33.)

Had the 1921 flood been removed a few miles further west, the disastrous consequences would have been as great as in 1929; had the 1907 flood that washed away fences, corrals, machinery and buildings (R. p. 754), and covered an area to Marmarth, North Dakota, a distance of 30 or 35 miles (R. p. 759), been removed 20 miles further north, the disastrous consequences would have been greater than those of 1929. The 1907 flood was greater than the 1929 flood in the south end of Wibaux County (R. p. 761, 753-754).

3.

Other Notice.

Rapelje, an officer of the Appellant, meeting a group of citizens in Wibaux in 1922, after the 1921 flood, promised a new bridge (R. p. 158, 169, 203). Charles E. White, as City Clerk and Clerk of the Commercial Club, wrote a letter to the superintendent of the railroad in connection with the inadequacy of the bridge (R. p. 109-110). White was not cross examined on this matter.

The case of Everetts v. Northern Pac. Ry. Co., 50 N. D. 894, 198 N. W. 685, a case brought against this appellant for the drowning of section men of appellant about 20 miles east of Wibaux in the 1921 flood that washed out the spur tracks at Wibaux and derailed the engine at Wibaux (R. p. 130, 87); the case of Soules v. Northern Pac. Ry. Co., 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A, 501, a case in which suit was brought against the Northern Pacific Railway Company for damages by water to store goods in Dickinson, North Dakota, a distance of about 64 miles from Wibaux on the main line of the Northern Pac. Ry. Co. The defense in both of these cases was somewhat similar to the case at bar. Commenting on those cases, the Supreme Court in the Heckaman case, a case arising out of the same flood as this one, 93 Mont. 384, 20 Pac. (2d) 258 said:

> "The law governing in such a case as this was brought home to the defendant in a case arising at Dickinson, North Dakota, in 1914. (Soules v. Northern Pac. Ry. Co., 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A 501.)

> "This brings us down to the Wibaux flood of 1921, which was described as 'a great flood' and was said by the district judge to have, perhaps, been unprecedented up to that time; the waters thereof inundated the town with the exception of a block or a block and a half in the business section, yet it was but the 'tail end' of a series of torrential rains which, fortunately for the inhabitants of Wibaux, extended east and west along the line of defendant's road, causing great damage at Yates, Beach, North Dakota, and other points east of Wibaux within an area greater than that of the north and south series of rains of June 7, 1929. The flood at Beach resulted in an action, and judgment, against this defendant, and it must be assumed that the officers of the defendant company were thoroughly familiar with the fact that the territory round about Wibaux was subject to those violent tempestous storms or cloudbursts. (Everetts v. Northern Pac. Ry. Co., 50 N. D. 894, 198 N. W. 685.)"

Much is said in Appellant's brief in connection with the testimony of Sutherland in regard to remarks by Rapelje. All of this evidence is substantially corroborated. Blum said, in connection with the expense mentioned by Rapelje, that the expense of raising the river bridge was a part of the expense of raising the track, and that the reason Rapelje and his associates came to Wibaux was because there was complaint made about water being under the viaduct (R. p. 203, 532-533). This must have been 11 feet deep at the bridge and then some to spread to the viaduct. Blum went up to the children's viaduct (R. p. 530), and, of course, he wasn't present during all of the conversation with Rapelje.

Blum's testimony as to the expense of raising the river bridge and the track corroborates Sutherland (R. p. 532). In fact, it appears that the railway company in 1922 had complete plans for a new viaduct, the raising of the track, and a new bridge (R. p. 203). Dan Sutherland testified:

> "And after he looked the piling over,—anyway, it was taken up about us getting a new bridge over Beaver Creek, and he said that at that time there were plans in St. Paul, were to raise the railroad track—I don't remember, it was five or eight feet—and that they wouldn't do nothing with that until they raised it, and when they did, they would give us a new bridge over Beaver Creek—a longer bridge—and also a new viaduct under Main Street. Joe D. Cullen was there at that time and when that conversation took place. There was never any new viaduct made there according to Mr. Rapelje's promise, before the flood of June 7, 1929. There was never any longer bridge made there before the flood of June 7, 1929." (R. p. 158.) (See also R. p. 203.)

In this connection, it will be noted that since the 1929 flood the plans have been executed, the track has been raised five feet and a new viaduct and a new bridge put in. The management self serving report of Rapelje (R. p. 543-545) certainly is incomplete; it doesn't mention raising the track, the expense, or anything of that sort, although all the testimony shows that those matters were discussed (R. p. 537). Mr. Bushell, a witness for Appellant, although present at the meeting with Rapelje (R. p. 205), was never interrogated in regard to that meeting.

4.

Narrowing of the Channel.

White testified that the "narrow get-away" mentioned in his article in the paper was the viaduct and the railroad bridge (R. p. 116). The evidence clearly shows that the creek was narrowed by the embankment over Beaver Creek. The old profile map clearly shows the bridge abutment inside of the east bank of the creek. The east wing of the dam north of the railroad bridge ran parallel with the original bank of the creek (R. p. 154), and the piers of the old bridge were 70 feet from the east wing of the dam. Lyman testified:

> "I found the nubs of an old dam here on the ground. They correspond with the bridge, in feet, on the ground,—the east end of the dam is about 50 feet east of the east abutment of the bridge; that would be 70 feet from the east pier." (R. p. 278.)

Sutherland testified:

> "I have lived in Wibaux about 33 years,—since 1901. I recall the old Northern Pacific bridge as it existed around 1900 or 1901 at Wibaux. I recall an old dam that was built about 40 feet north, or downstream from the bridge.
>
> Q. Tell us what correspondence, if any there was, as you remember it, between the east wing of that dam and the natural bank of the stream that existed there? How did they correspond?—the east bank of the stream and the wing of a concrete dam that existed there?
>
> A. The wing of the concrete dam ran parallel seemingly, with the original bank of the creek,—I should judge right against the bank. The width

> of the river-banks at the bridge as they first appeared to me when I went to Wibaux, I should judge was about 180 feet." (R. p. 154-155).

The evidence further shows that around the year 1900 people drove on the channel between the piers and the abutments, but later on those spaces—*20 feet on each side*—were filled in with rock (R. p. 48). Woodard, a witness for the Appellant, attempted to disprove the fact of driving between the piers and the abutments of the bridge around 1900 or 1901, but he didn't get to Wibaux until 1909 (R. p. 734, 741). The dam north of the bridge was built in 1903 (R. p. 589). Of course, nobody could drive through there after the dam was built (R. p. 744). In the beginning there was a clear space of 114 feet from top to bottom of the bridge; as the railroad embankment was raised from time to time in order to save the expense of putting in new piers and new abutments, Appellant simply filled in between the piers and abutments on both sides of the bridge, to give the bridge the necessary strength to carry the modern engines. The bridge was first designed to carry small engines, not considering the increased weight of engines designed later. The evidence shows that there was added cement put on top of the piers when the track was raised in 1903 (R. p. 584), and the bridge was reinforced in 1904 (R. p. 618).

Blum, chief engineer for the Appellant, testified:

> "If the bridge is so narrow that it extends water to the east of the bridge, on the side of Beaver Creek, is that an adequate bridge?

A. Ordinarily speaking, it is not; but it might be in some cases." (R. p. 693).

"If that bridge did back up water 1200 feet six or eight times and made a horseshoe around the town and water ran down the swale, why that bridge was not adequate, was it?

A. Possibly not; probably not." (R. p. 694.)

Clements further testified that the east span of the new bridge was the main span of the old bridge (R. p. 609). Clements, testifying on direct examination from Defendant's exhibits D-24 and D-23 (R. p. 578), photostatic copies of the bridge records of defendant (R. p. 575), and translating from these records the various high water marks as set forth (R. p. 579-588) and placing yellow wands on the bridge models to represent these high water marks (R. p. 588), deliberately ignored the letters of Defendant's exhibit D-24 "H. W. 1900, 7.3," meaning "high water in 1900" (R. p. 603), and deliberately failed to place a yellow wand to represent the 1900 high water mark when the water just touched the girder of the bridge (R. p. 603, and was 15 feet above the bed of the stream (R. p. 289), and when cross examined on this matter said:

"I have not prepared any of these little yellow wands and tacks to show the water-mark of 1900 on that bridge." (R. p. 613.)

At this trial there was a record of the 1921 flood, but at the Heckaman trial Clements did not have any record of the 1921 flood. He said that they did not keep any high water record *unless it was higher than*

the previous flood, so that the last high water-mark introduced in the Heckaman trial was the 1900 high-water mark, which goes to show that it was higher than the 1921 high-water mark.

Clements admitted that cloudbursts occurred in the territory about Wibaux (R. p. 613.)

Blum testified that a bridge 114 feet was sufficient (R. p. 626, 689). On pages 627-628 of the record, Clements evades all questions in regard to a 114-foot bridge.

Clements further advanced a theory, in order to contradict the plain physical conditions shown by the old profile map of Appellant (plaintiff's exhibit 26), (just as he, Clements, endeavored to contradict the plain record of the 1900 high water mark on defendant's exhibit D-24, R. p. 604), although he wasn't there and didn't go to work for the company until 1907 (R. p. 572), that at the time the railroad was built, there was a sort of swampy ground at the bridge and no defined banks (R. p. 600-601). Darling says:

> "N. P. records further show the banks of the Beaver Creek to be no greater distance apart than 80 feet." (R. p. 714.)

Darling did not produce these records although requsted to do so (R. p. 713-714).

Clements further testified that the little stream coming down the north side (see sketch attached to Appellant's brief) originally cut across where the railroad embankment now is (R. p. 601). Beaver Creek runs from north to south. In order for the little stream

north of the embankment referred to by Clements, to cut across the embankment, it would have to enter the main stream against the flow of water, which phenomena is an impossibility, all tributaries enter the main stream with the flow of the stream (R. p. 302). The acute angle is always in nature in sandy soil upstream.

Mr. Murray, civil railroad engineer from Portland, Oregon, testified as follows:

> "Q. And you were asked this question: 'Mr. Murray, the best test, and perhaps the only good test on the sufficiency of a bridge over a particular stream is whether it carries the water that is seen to run in that stream year by year—isn't that the best test?' I asked you that question there, and you answered: 'That is the best test under ordinary conditions, yes.' You were asked this question: 'In fact, when a bridge after being constructed is seen not to carry away floods that recur every two or three years, there is something wrong with the bridge, isn't there?' A. Yes. Q. And you answered: 'If the bridge interferes seriously with the regular flow of the stream, I think the bridge is inadequate.'" (R. p. 700-701.)

Darling, the man who designed the bridge, never saw it since 1900 (R. p. 713), and although testifying from bridge records (R. p. 714) and requested to supply the original survey or a plat of the original survey of the Northern Pacific Railway Company or its predecessor, showing the elevation of its track as originally laid down from Medora to Glendive, *failed to attach them to the deposition* (R. p. 713).

5.

Stream Was Not Restored to Its Original State of Usefulness, As Near As May Be.

Subsec. 5, Section 6507, Revised Codes of Montana, 1921, provides:

> "Every railroad corporation has power * * * : 5. To construct their road across, along or upon any stream of water, water course * * * which the route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course * * * thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise."

The fact that Clements, bridge engineer for Appellant, as contended on page 39 of Appellant's brief, said:

> "My opinion was, it would carry the water as well as it would, had there been no railroad there."

or the fact that Lillis said the embankment did not have any effect whatever on the water south of the embankment, as contended on page 40 of Appellant's brief, or the fact that Darling, the engineer who originally constructed the bridge and never saw it or inspected it since 1900 (R. p. 713), said in his opinion the stream was restored to its original state of usefulness as near as may be, doesn't carry much weight. The physical conditions and all of the evidence in this case clearly show a violation of the statute.

The position of the nubs of the east wing of the dam right along side of the east bank of the creek, the nubs of the old bridge inside the banks of the creek, the narrowing of the original bridge from 114 feet to 65 feet, the width of the channel at the closest measurement Oien made for Appellant north of the bridge (700 feet) was approximately 170 feet (R. p. 295), the backing-up of water on the occasions of ordinarily recurring storms into the Davis Addition and around the town in a horseshoe fashion, together with all the other evidence, clearly show a violation of the foregoing statutes.

In the case of Heckaman v. Northern Pacific Ry. Co., 93 Mont. 363, 20 Pac. (2d) 258, a companion case, and arising out of the same flood as this case; the store buildings of both Wagner and Heckaman being the same distance from Appellant's embankment, both stores on the same street, First Avenue South (see sketch attached to Appellant's brief) and on the same elevation 2635 (R. p. 559), or 15 feet above the stream, with the exception that the floor of Wagner's building was at an elevation of 2635.9 (R. p. 560) or 15.9 feet above the stream, and with the further exception that the height of the lowest clothing from the floor in Wagner's store was a foot or a little more (R. p. 339, 173), leaving the Wagner clothing and goods close to 17 feet above the stream; it was held in the Heckaman case, above cited:

> "Conceding that the storm of 1921 was 'unprecedented' and might not, under the authorities cited by counsel for defendant, be notice that a like or

greater storm might thereafter occur, the evidence epitomized above is sufficient to warrant the finding that the openings in the embankment were, to the knowledge of the defendant, insufficient to permit the waters of Beaver Creek 'in ordinary recurring high water' to flow down the natural channel of the creek, and, consequently, establishes the violation by the defendant of the mandate of section 6507, above, in that the defendant did not restore the stream to its original usefulness, as near as may be.

"This antecedent and concurrent negligence is shown, and, as above pointed out, the evidence clearly shows that the damage done the plaintiff was 'in whole or in part,' and perhaps wholly, due to this negligence. It follows that the fact that the flood of 1929 was unprecedented is no defense, and the verdict and judgment are warranted by the evidence."

6.

1929 Flood.

The proof absolutely and conclusively shows that the inadequacy of the openings in the embankment was the proximate cause of the injury. As stated in Appellant's brief, p. 11, the depth of the water at the south side of the bridge was 2640 or 20 feet deep, whereas the uncontradicted depth of the water at Lentz's place on the creek north of the bridge was 8½ feet according to measurements made by engineers (R. p. 282-283). Thus, the difference in depth of the water north and south of the embankment at the bridge in the 1929 flood was 11.5 feet. Presthus, the section foreman, was not far off when he testified that there was only

an inch of water in one of the rooms in the section house immediately north of the embankment, while across to the south side a distance of a couple hundred feet, there was about 10 feet of water (R. p. 259). Manning testified that the water was from 5 to 7 feet lower on the north side than it was on the south side (R. p. 210); Howard testified that the water on the south side was 7 or 8 feet higher than the water on the north side (R. p. 227); when the embankment broke the water went down fast (R. p. 227), whereas the high water at Massey's had fallen very little in the afternoon (R. p. 138), 4 or more hours after the water was out of Appellee's place of business on Main Street. Nelson, who lives 25 miles south of Wibaux (R. p. 760), testified that the water was highest at his place about 10 o'clock (R. p. 761). Combes, the aviator, testified:

> "At 11:00 o'clock in the day the river 18 to 20 miles south looked equally as high as at 10:00, and that was June 7th, between the hours of 10:00 and 11:00." (R. p. 526.)

Shea testified that he lived about 15 miles south of Wibaux (R. p. 363); that he didn't see any wall of water on the morning of the flood (R. p. 367); and that it would take water 15 hours to get from his place to Wibaux (R. p. 368).

Water was backing into basements from the embankment before there was any water on Main street or in appellee's place of business (R. p. 67, 235); water was backing up from the embankment from 4 o'clock on, 3 hours or more before it reached Main Street (R. p.

52). It, therefore, is conclusively shown that the embankment with its insufficient openings was the proximate cause of the damage to plaintiff.

The proof shows that there was little rain at Wibaux, and all of the heavy rains during the 1929 flood were far south of Wibaux and on tributaries running into the Beaver. Brophy, who lives 6 miles south of Wibaux, testified that the water struck his place at 4 o'clock (R. p. 389). It must be noted that Brophy's place is very low. Brophy testified further that he had been bothered with water several times before 1929, and that he built a dike about 8 years ago to keep the water from running into his yard (R. p. 393-394); but that upon at least 2 occasions the water flowed into his yard and he had to move to higher ground (R. p. 394). Bryson, 38½ miles south of Wibaux (R. p. 347-348); Stark, 31 miles south of Wibaux (R. p. 347); Moline, 30 miles south of Wibaux (R. p. 353), testified for Appellant (R. p. 341-355); a dam that was supposed to have been washed out by the 1929 flood, was actually washed out by prior floods (R. p. 343); all of the water that fell in that vicinity, proceeding north went through a bridge on Beaver Creek without washing the bridge out (R. p. 354-355). Holstein, a witness for the Appellant living about 12 miles southeast of Wibaux (R. p. 378), testified that his house was about 7 feet above the bottom of the creek, and that no water got into his house (R. p. 381); that he lost 240 sheep (R. p. 380) because his men didn't take them the evening before the flood at Wibaux to higher ground, they were on lower ground than the floor of his house which was less than

7 feet above the bottom of the creek (R. p. 381). Efta testified for Appellant that he was marooned at Wicka's, 11 miles south of Wibaux (R. p. 372), that Wicka's house was about 7 feet above the bottom of the creek (R. p. 369), and that the barn was 4 feet higher than the elevation of the ground at the house (R. p. 371). That would make the barn 11 feet above the bottom of the creek. He further testified that a wall of water ½ to ¾ of a mile wide (R. p. 373) and 6 feet high was coming up the valley (R. p. 371); that it didn't move a barn which was made of drop-siding 6-inch boards (R. p. 412); that the first raise of water was about 17 feet, and that this went down 4 or 5 feet, and then it raised again and stood at 15 feet at 2 o'clock in the afternoon (R. p. 374-376). All this water went through Wibaux after defendant's embankment broke without doing any damage to anybody, because nature had forced sufficient openings in the embankment to carry it by the natural channel.

Of course, as this water came down Beaver Creek Valley on the morning of the flood, it became less in volume as it proceeded. The actions of this flood at Burke's according to Burke's testimony, seemed to be confined within the banks of the creek and a swale between the barn and the house (R. p. 428); and this water apparently reached his place around 4:30 in the morning (R. p. 425). After Burke had his calves out of the barn, which was built inside the creek bank (R. p. 419), and the water was passing, the Parker boy drove into Burke's yard with a Ford car (R. p. 772). The Parker boy further testified that he left

the Ford car in Burke's yard and it wasn't damaged (R. p. 773).

A page and a half, 13 and 14, of Appellant's brief is devoted to a summary of Miss Jones' testimony who was 17 years old at the time of the flood. Let us analyze Miss Jones' testimony: she lived 2½ miles south of Wibaux (R. p. 460), about 1 mile north of Clem Parker's (R. p. 473), ½ mile south of Joe Burke's, Burke lives 2 miles south of Wibaux (R. p. 418). Massey lives north of Burke's, in town, as appears on relief map. Plaintiff's exhibit P-7 prepared by Oien, is a cross-section taken at Joe Burke's, 2 miles south of town, showing the distance between high water marks *420* feet, and the raise of water at Burke's *16.4* feet from low water (R. p. 335). How could all the walls of water about which Miss Jones testified, coming up the valley one after the other, get through an opening at Burke's of 420 feet wide without going clear over Burke's house? How could all these walls of water get through a 600 foot opening at Massey's without sweeping away Massey's house and the chickens which weren't molested in his yard, at an elevation of 14 feet above the creek (R. p. 274)? How could Massey's horses and sucking colt have stood on an elevation of 12 feet above the creek bottom, against the water, and not have been washed away? How could all the little wooden houses near the water tower have stood up against all these walls of water? Miss Jones' testimony will not stand up under analysis. We have used more space on her evidence than it deserves, but we believe this analysis is sufficient to answer all the witnesses of Appellant who testified about walls of water.

While we are on Miss Jones' testimony, she testified:

> "As to whether I beat that wall of water down or whether it beat me in the race,—it was coming; when I got there, it had already come to Wibaux; I believe I would say it beat me there; it beat me very little." (R. p. 472.)

Then she testified that she rode her horse half way down Beaver Street, half the length of the board walk, and that then this wall of water cut across the country through the town (R. p. 466). She further testified that from where she was (down near the county bridge) she couldn't be accurate as to how far this wall of water extended to the west of Kinney's house (R. p. 467). She further testified:

> "Q. Would you say that when that wave or wall of water reached the top of the swale as we call it, that it came towards the east or went down the swale, which?
>
> A. Well, it seemed to divide more or less, it bumped into the buildings, the majority of it I believe, went to the east,—the greatest speed,—towards the county highway bridge; not directly east, but it came in a general easterly direction." (R. p. 490).

The fact of the matter is, Miss Jones never reached town until about 8:30 and never rode her horse down toward the county bridge as Wesley White borrowed her horse (R. p. 769). Further, it was impossible to get near the street where the board walk runs from 4 o'clock on during the morning of the flood (R. p. 234). In fact, Mrs. Edighoffer, another wall of water witness for Appellant, said that the wall of water went over the

top of the foot bridge, over the top of everything, and over the top of the cinder walk (R. p. 446). The cinder walk is a continuation of the board walk south to Ostby's.

Miss Jones, therefore, testified:

(1) That the walls of water beat her to town.

(2) That when she reached town down near the county bridge, she saw this wall of water come across the country through the town.

(3) That from where she was she couldn't see west of Kinney's house.

(4) That she saw the wall of water divide at the swale west of Kinney's house.

Her evidence is all self-contradictory, proceeding from youthful imagination.

Defendant's exhibit D-11 shows the corrected figures as agreed to by Mr. Oien and Mr. Lyman.

> "Elevation of nominal low water Beaver Creek at Massey's cow shed 2632.2 * * * * Elevation of high water June 7, 1929, about 200 feet west of Massey's house 2643.5." (R. p. 685.)

On P. 15 of its brief, Appellant says that defenant's exhibit D-17 introduced in evidence shows in color the low water mark and high water mark at Massey's, and the difference between the low water mark and the high water mark on this exhibit is 14.2, according to the figures on defendant's exhibit D-11, agreed to by Oien and Lyman (R. p. 335). Mr. Lyman testified:

> "As to what the rise of water was at Massey's place on June 7, 1929, he has no cross-section from

> that but his figures that we have checked on. I think those figures are a matter of evidence; they are on the list of elevations on which Mr. Oien and I agreed. That is here now—D-11; from that, I was able to determine the rise at Massey's as 11.3 feet on June 7, 1929. In consideration by anyone, of D-11 and the figures for elevations set in this column here, 2620 feet should be subtracted from each of these to determine how high the given point is above the point B under the Northern Pacific bridge—2620 should be subtracted, and that is the top figure in the column, so that the next point, 2635.4, is really 15.4 above the bottom of the river under the bridge." (R. p. 335).

The difference between those two elevations is 11.3 feet, which was the depth of water at Massey's during the 1929 flood (R. p. 268, 685).

It was agreed by all witnesses that the water didn't get on the street in front of Appellant's place of business until 7 o'clock or after on the morning of the flood. Burke's residence is about 2 miles south of Wibaux. What happened to all those walls of water that supposedly came past his place at 4:30? There wasn't any such thing as a wall of water (R. p. 139, 763, 771, 775). There was no water in Burke's house 2 miles south of Wibaux in the 1929 flood (R. p. 430). There was no water in Clem Parker's house 4 miles south of Wibaux in the 1929 flood (R. p. 672). There was no water in Massey's house three-fourths of a mile south of the railroad in the 1929 flood, and his chickens sitting on the ground around the house weren't molested by water (R. p. 138). The elevation of the ground above the creek right at Massey's house was 14 feet

(R. p. 274). Massey further testified that he had 10 head of work horses and 2 colts stationed northwest of his house, that is, between his house and the railroad embankment, and that the water was up 1½ feet on the horses' legs (R. p. 137). Those horses stood all through the flood on an elevation of 3 feet lower than the street at Wagner's without being harmed (R. p. 137). The ground where the horses stood was about 12 feet higher than the bottom of the creek at Massey's (R. p. 302), and the water raised on those horses 1½ feet (R. p. 137). This is absolute proof that there was no wall of water and stands uncontradicted.

Appellant on page 26 of its brief quotes from the testimony of Zinda. Zinda lived in a house on the bank of the creek close to the swale (R. p. 642); he left his car and walked a distance of 5 blocks to Pickering's Pool Hall (see relief map and sketch attached to Appellant's brief) after the wave of water killed his car; as he walked past Wagner's, 4 blocks from where he left the car near the mouth of the swale (R. p. 159-162), there was a shallow sheet of water there (R. p. 642). Of course, at this time the low lands all around the town were filled up with water and had been filled up for more than 3 hours before that time (R. p. 52). The water was going over the mouth of the swale by the water tower and west of Zinda's long before there was any water on Wibaux Street at Wagner's (R. p. 162.) The town was surrounded by water before there was any water on Main Street (R. p. 54).

The action of the water at Wibaux on the morning of June 7, 1929, is clearly set out by the employees of Appellant who came to Wibaux about 6:30 with a work train on the morning of the flood. Eiden, one of the employees of Appellant and a witness for Appellant, testified that the train reached Wibaux about 6:30 and remained there for about 2 hours (R. p. 782); that at the time they reached Wibaux the water was coming inside the viaduct and it raised steadily until they decided to go back to Beaver Hill (R. p. 783); and that it raised steadily as long as he was there, and that possibly down through the viaduct it was going faster than any place else (R. p. 783). (See also 160-161). People were walking around on Main Street rescuing others when the water was up to their knees (R. p. 82), and walking in water up to their waists (R. p. 163).

Another peculiar thing in connection with the trial of this case, is that John Presthus, section foreman at Wibaux for 23 years (R. p. 258-259), was never produced as a witness to tell about conditions at Wibaux during the flood, or conditions at Wibaux before the flood, although he was on hand at Wibaux during this trial (R. p. 777).

The witness Kimball, a roadmaster for Appellant, testified that when he first arrived at Wibaux there was possibly 2 or 3 feet of water going through the viaduct and the majority of that water was coming back by the lumberyard, back by the depot, and that some of the water was coming from the Catholic Church

(R. p. 729). Kimball further testified that at 9:00 or 9:30 he looked off and saw a wall of water coming at least 5 or 6 feet high (R. p. 728). Kimball also testified:

> "It was coming down Wibaux Street and to the main channel and to the west and coming towards the railroad once probably. When I seen it first, it was back by the lumberyard or possibly back up by Orgain Street, they call it. As to where that wall of water went: it came down and went through the viaduct and bridge." (R. p. 728-729).

He wouldn't say if this wall of water was going straight north up Wibaux Street (R. p. 732). The other train men saw no such phenomena (R. p. 777-784), and there were no other witnesses produced to tell of this phenomena. At this time the bridge was full, still the wall of water went through without taking out the bridge (R. p. 730), and without moving the Kinney house, the Zinda house, or all the other houses south of town.

Woodward, a witness for Appellant, testified that he was standing on the embankment during the morning on the west side of the viaduct; that he was looking toward the north and south sides of the line because he had interests both ways; that although he heard Kimball testify about the wall of water, he didn't see any wall of water (R. p. 743). Cullen, a witness for Appellant, didn't see any wall of water coming down Main Street in Wibaux on the morning of June 7, 1929 (R. p. 500).

Wesley White portrayed the action of the creek on the morning of the flood vividly. He testified:

> "As I crossed this railroad bridge at that time, describing the condition of the waters to the south of the bridge, will say that the opening in the railroad bridge itself was full and then on either side of the east and west side of the opening, the water was very much higher there, probably 4 or 5 feet. The water couldn't get through you know and it was backing up around—backing up to the east and backing to the west. As to the direction that the waters were taking that were backing to the east or going to the east, will say they were backing and coming around—just making a circle and coming past around the elevators into the Davis Addition." (R. p. 767).

Oswald Jobe testified for Appellant that he was working in the Hazlewood garage; that he got up in the morning between 6:00 and 6:30; that as he proceeded to the garage there was water coming down on the other side of the highway (this is the old swale); as he walked back toward the pool hall (Pickerings'), he saw water running between the lumberyard and the depot; that there was no water at that time on Wibaux Street or Orgain Avenue (R. p. 723-724); that after going to the pool hall, returning to the Milton Hotel (going west from Wibaux Street and along Orgain Avenue), the water was up to his breast; and that the water was coming around the garage toward him (from the west toward the east) (R. p. 725-726). Jobe further testified that it was coming around west of the Hazelwood garage and down Orgain Avenue, and also coming into the garage from the Milton Hotel, from the south,

and then turning down towards the north (R. p. 726). White testified:

> "According to my observation, there was a continuous swirling in the town during the entire flood period. You could hardly tell whether water was coming from one direction or another. There was a continuous swirling and at the time of the going out of the Methodist parsonage, the water seemed to be boisterous and receding back from the railroad embankment to the south of the town." (R. p. 107.)

Articles moved in all directions during the flood. Shingles floated from the lumberyard straight west (R. p. 63); an oil tank floated up to the Catholic Church (R. p. 164); Drake said he saw a lot of stuff floating throughout the flood, some of it came up to Wibaux Street and then went east, and some came out of the same warehouse and went west (R. p. 96); the Odd Fellows' Hall moved the length of itself in a northwesterly direction and turned right around (R. p. 164). This proves that the water was swirling around. The county bridge drifted in a northwesterly direction (R. p. 62) and landed back of the depot. The Methodist parsonage floated straight east off its foundation into the main channel of the creek (R. p. 69). Mrs. O'Keefe saw a barrel floating from the *north* to the *south* in the Davis Addition (R. p. 72). All of the people in the Davis Addition were moving to the south (R. p. 75, 763). Manning testified:

> "I owned a building, a theatre, on Orgain Avenue at that time. There was plenty of change in the furniture, you might say, that took place during

> the flow; it was all moved around every direction. Another article there, after the flood that I didn't have before,—I accumulated a tree in the front end, or chopping block, or whatever you want to call it. It was 5 to 7 feet long and probably 18 inches through. As to how that got through into the building, from a hole that I found there, it apparently had broken through the two storm-sheds. This hole was on the north side." (R. p. 210.)

Cullen testified that the water came rushing past the door of the lumberyard from up Orgain Avenue coming west, but when he got into the middle of the street the current wasn't so strong (R. p. 498-499). Paulson arose at 6:15 (R. p. 512), and the water seemed to be flowing into the south door and out of the east door (R. p. 513-514). Paulson didn't hear any rumbling noise of water before he got up (R. p. 514).

In connection with Stark's testimony (R. p. 506), nobody denies that there was plenty of water going through at the bridge in the afternoon. There wasn't any water on Main Street or Appellee's property at 1 or 2 o'clock. Paulson got off the stove at 1:30 (R. p. 514). Plaintiff's exhibit P-2 (the screen) shows very vividly the rise of the water on the north side (R. p. 150-151). Mrs. Sutherland, whose home was on the north side, testified that the water started rising in her house about 10 o'clock in the morning (R. p. 232). This is about the time the embankment broke. When the embankment broke it made a great noise, as the breaking of the sidewalk and the cracking of the timber could be heard even above the noise of the water (R. p. 93).

All of the evidence shows that the water was about 5 or 6 feet deeper on the south side of the embankment than on the north side, with the exception of Appellant's witnesses Woodard and Engineer Lillis. Pickering testified that as the water went through the viaduct it looked like a waterfall (R. p. 57). Lentz testified that when the opening at the bridge filled up, the water was like water going over a fall (R. p. 149); that after the embankment broke the water started to rise on the north side (R. p. 149-150).

Woodard testified that there was a sign on the Orgain building across from the lumberyard and facing north, and that this sign had the word "Groceries" on it; that he gauged the height of the water on the south side of the embankment by this sign (R. p. 739). At this point, we might say that the high water mark that he saw on the word "Groceries" must have been back-water, as the wall is facing north with a block of buildings south of it to the Wagner building and a fall of 4 feet from there to the viaduct, and immediately north of the track in the section house, the water came up 1 inch on the kitchen floor, whereas, opposite the house across on the south side of the track between the depot and the Orgain building, the water was about 10 feet deep (R. p. 259). This proves conclusively that the water reaching "Groceries" was back-water. Woodard further testified that he gauged the height of the water on the north side by a tree at the junction of Noland and Wibaux Street (right opposite the viaduct), and that the water was 6 feet deep, touching the limbs (R. p. 740-741). Of course, there was bound to be

deep water right opposite the viaduct, especially so after the embankment broke. The impetus of the water of the impounded lake south of the embankment raised the water undoubtedly on the north side when the embankment broke.

Sherman testified that he observed a door of the Community Church north of the viaduct swinging in the wind before the embankment broke when the water was highest on the south side of the embankment; that after the viaduct washed out, the water raised so that it closed the door against the building (R. p. 83). Lyman testified:

> "All that portion in town south of the railroad track was covered by a comparatively level lake of water * * * * The entire south portion of town,—the portion west of the creek and perhaps half of the Davis Addition had been covered with water at a certain depth, and that north of the railroad embankment, downstream, and east of the creek, the water was from 10 to 13 feet lower than it was on the south side and west of the creek, and north of the embankment there was a difference of between 6 and 7 between the south side and the north side of the embankment." (R. p. 266).

In the face of all this testimony, Lillis, the hydraulic engineer for Appellant, said the embankment didn't have any effect whatever on the depth of the water on the south side of the embankment (R. p. 645-646, 653). Lillis further testified that in arriving at his computations, he did not take into consideration the testimony of Shenehon (R. p. 656); the testimony of John Presthus, the section foreman, that the water stood 10

feet higher on the south side than it did on the north side of the fill (R. p. 657); the testimony of Mr. Oien that there was a different high-water level of marks on the north side of the railroad from what he found on the south side, and particularly at the Sutherland oil station (R. p. 657); the testimony of William Lentz that there was a difference of 10 or more feet between the high water marks at his place and the high-water marks at the Sutherland oil station (R. p. 657); the testimony of Massey that the water remained at about the same stage at his house until 3 o'clock in the afternoon of June 7, or approximately the same stage (R. p. 677); the testimony of John Bailey that water was backing up behind the building and came in from the north to the south (R. p. 679); the testimony of Miss Webber, the telephone girl, who said the water stood behind the telephone office here coming up from the north to the south for half an hour before it got onto the street in front of the telephone building (R. p. 680). Lillis further testified:

> "The water had gotten over that part of Wibaux before it ever got to the railroad track, and it would have done so whether there was any railroad track there or not. I didn't take into consideration testimony that the water was going through the viaduct 4 or 5, or even 3, feet deep, coming from the east, and some coming from the west, before it got opposite Wagner's property at all." (R. p. 679).

Appellant on page 56 of its brief quotes from the testimony of Lillis stating that Lyman had testified that

water reached a depth of 14 feet at Massey's during the 1929 flood. As heretofore stated in this brief, both Lyman and Oien found the water to be 11.3 feet deep. If, as set forth in this excerpt from the testimony of Lillis, water merely splashed over the acute angle southeast of Massey's caused by digging coal (R. p. 439-440), why would 7 feet of water splash over by the water tower where the angle is not nearly so acute, and if this phenomena occurred what would have happened to all the wooden houses (R. p. 515) in that vicinity? The only house in that region that was washed off its foundation was the yellow house and it was in the mouth of the swale. The Methodist parsonage was a block north and a block east of the bend.

As hereinbefore set forth, the elevation of the intersection on First Avenue South and Wibaux Street, where the Wagner building is situated near, is 2635 or 15 feet above the bottom of the creek (R. p. 559), and if water seeks its level, how could 7 feet of water flow from an elevation of 7 feet above the creek up to an elevation of 15 feet above the creek? Further, the evidence shows that the elevation of E Street, in the path of the swale, is 2633 or 2 feet lower than the street at Wagner's place, and if we concede that 1½ feet of water had gone down the swale, as it did southeast of Massey's, it couldn't by any stretch of the imagination get up to Wagner's place of business. There never was an opening in the railroad embankment at the south end of the swale.

Lillis further testified that he computed the number of cubic feet per second that went through Wibaux

at the time of the flood; he computed it just below Massey's, by the "horse island" six or seven hundred feet north of Massey's; he figured the quantity of water flowing by there was about 36,000 cubic feet per second (R. p. 649); he said the cross-section was 1700 feet wide (R. p. 657); that he made those computations according to Kutter's formula (R. p. 657-658); by using the same formula at First Avenue South he found 46,000 cubic feet per second passed through there (R. p. 661); and at a cross-section at Burke's, 2 miles south of town, 19,800 cubic feet (R. p. 673). Lyman figured it at 16,000 cubic feet, round figures, at Massey's. We think that the testimony of Lillis is not worthy of any consideration. At a former state court trial, Shenehon testified that with no embankment there would have been about 1½ feet of water on Wibaux Street. At another trial at Baker, an engineer for appellant Pennington testified to about the same effect. In the face of all the other evidence in this case, the jury couldn't believe the testimony of Lillis.

Much is said in Appellant's brief about Lyman stating that 30,000 cubic feet of water went through at Massey's. This 30,000 cubic feet of water was injected into the Heckaman case by Shenehon. Lyman had then made no independent study of the matter; he simply took Shenehon's word for it; in his testimony at prior trials, he simply assumed that there was 30,000 cubic feet of water going through.

> "Q. Mr. Lyman, attention was called to certain of your testimony, about you having said, or claimed that you said, that there was 30,000 cubic feet of water passing Massey's. Was that given in an-

swer to a hypothesis of counsel that was submitted to you?

MR. McCARTHY: I submit the record itself shows.

Q. Read the record given at the same time and at the same examination, and from page 405 (Transcript on Appeal, case of J. R. Bailey, et al., and other cases, vs. Northern Pacific Ry. Co.)

A. Do you want me to read it aloud?

Q. Yes. Read it aloud, and commence at line 5. Was that testimony given by you at the same time and same examination where they say that you said there was 30,000 cubic feet going—Read it.

A. 'Taking my figures and assuming they are correct, and assuming there were 10,000 cubic feet of water per second passing by Mr. Massey's place in 1921, and 30,000 cubic feet of water per second passing by Mr. Massey's in 1929.'" (R. p. 329-330).

Lyman further testified:

"Q. When you were speaking of any speed of water at Massey's of 8 miles per hour, did you have in mind what counsel asked you to assume—that there was 30,000 cubic feet per second?

A. I think that was the basis—that certainly was my impression—that it was referring to a proposed flow of 30,000 cubic feet per second. I never assumed that there was any such flow there; I never believed that there was." (R. p. 332-333).

Lyman testified that the fall of the valley south of Wibaux was about 12 feet per mile, which means about 6 feet per mile on meanders, which is approximately twice the value of 3 (R. p. 338). He, therefore, used a slope of 3.2 per mile, hence his computations of 15,813 going through at Massey's. This amount going through at

Massey's compared with the amount, according to Lillis, going through at Burke's, and seems to be as nearly correct as computations can be made in this sort of matter. We make this statement because the vertical cross-section area of water going past Burke's was 4427 square feet (R. p. 673); the vertical cross-section area of water going past Massey's about 1½ miles north of Burke's was 3,774 square feet; however, the vertical cross-section area of water going through 3,000 feet south of the embankment, or 650 feet north of Massey's, where the water was 1700 feet wide and 13½ feet deep, and where Lillis made his computations of 36,000 cubic feet per second, was 9,271. Under no stretch of the imagination could the area of the water at Massey's going through a cross-section 600 feet between high water marks, be increased 2½ times 650 feet further north excepting by back-water. Therefore, computations figured at this point are of no more importance than computations at First Avenue South, 600 feet south of the embankment, where Lillis found 46,000 cubic feet per second.

The only actual demonstrative speed of water proven by any witness at this trial was that of Burke who testified that it took him 1,5 minutes to take the calves out of the barn, and that before he started to move the calves he saw the roll of water 50 rods or some such matter away (R. p. 432). Certainly, this water was not traveling 3 miles per hour.

On page 65 of its brief, Appellant for some unknown reason, states that according to Lyman's theory, when water couldn't get through the county bridge it would

go over the highway east of the county bridge. Lyman simply gave the actual measurements and elevations of the low ground east of the county bridge. In other words, this proof by Lyman which hasn't been contradicted, and couldn't be contradicted, shows conclusively that there was no embankment at the county bridge to hold and dam up the water, and therefore exploded the Appellant's affirmative defense of an embankment at First Avenue South. The presiding judge, the Honorable Charles E. Pray, saw the force of this argument (R. p. 280-281).

Lyman again is criticised on page 65 of Appellant's brief, that with a 10 or 11 foot flow of water the banks of the creek at the bridge would show 600 feet wide. In this regard Lyman was testifying from plaintiff's exhibit 26, the old profile, and testified that the portrayal of this condition on exhibit 26 corresponded with the relief map. However, on page 34-35 of its brief, Appellant contends that a 10 or 11 foot flood would come up against the bank or bench land, or level on which the buildings of the town stood, and would lack 3 or 4 feet of reaching the level of the town. This we agree to; but how can Appellant consistently contend in other parts of its brief that 7 feet of water, or less, would flow from an elevation of 7 feet in the creek bank south of town and go to an elevation of 15 feet at the street at Wagner's place, placing 5 feet of water in his store at an elevation of 20 feet above the creek; where the water south at Massey's was 11.3 feet above low water and the water at a cross-section 3,000 feet south of the embankment where Lillis took his measurements was

only 13½ feet where the horses stood, and which was enhanced several feet by back-water? The contention collapses.

The fall of the creek from Massey's to Mattie Miller's is 2.6 feet, or 3½ feet to the mile; from Mattie Miller's, or the green house, to the county bridge, 4.2 feet, or 13 feet to the mile; from the county bridge to the railroad bridge, 4.2 feet, or 15 feet to the mile (R. p. 297). Hence, the terrific fall of the creek from Mattie Miller's to the railroad bridge, which before it was dammed by the railway, enabled the water to evacuate and flow more freely (R. p. 298). By nature the site of the town was safe. The elevation of the terrain for several hundred feet on either side of the creek from Mattie Miller's to the railroad bridge is several feet lower than the Appellee's place of business. Because of these facts, the flood of 1929 would have, as nature intended, followed the creek and this low land to the bridge and would never have reached the town had it not been for the embankment with insufficient openings therein. This is proven conclusively by conditions north of the bridge on the creek where the slope and physical conditions were about the same as that south of the embankment, with the exception that the valley was much *narrower* north of the embankment than south (R. p. 266-268); the flood north of the embankment at Lentz's, 800 feet north of the embankment. was 8½ feet deep (R. p. 282), which depth was enchanced by release of impounded water south of the embankment after the embankment broke.

The fact that water south of the embankment was a comparatively level lake (R. p. 266) is further conclusive

proof of the absurdity of Appellant's contention that the flood water went over the embankment south of the town instead of following the creek and low land. If this were true, without the aid of tributaries or rain, there would have necessarily been 2 or more levels of water south of the embankment.

An observation of the bend of the creek turning in a southerly direction south of town, tends to mislead, but as hereinbefore shown, the tremendous fall actually follows the bend.

Defendant's affirmative defense of a wall of water 6 or 7 feet high and 2200 feet wide passing through the town and against the highway embankment on First Avenue South and flooding the property of the plaintiff to a depth of 6 or 7 feet before it reached the embankment (R. p. 36) has not been proven. We have seen that the embankment at First Avenue South couldn't stop any water because of the lowness of the land east of the county bridge which is 9.7 feet lower than the floor of the county bridge (R. p. 338). Wagner's place of business was north and west of this so-called embankment, and therefore the embankment should have been a protection to him rather than a detriment.

The evidence further shows that 700 feet north of the embankment on Wibaux Street, north of the viaduct, the width from high water to high water mark was 1420 feet, and the depth from the bottom of the creek 15.5 feet (R. p. 294); whereas at Lentz's place 800 feet north of the railroad bridge, the depth of the water during the 1929 flood was 8½ feet (R. p. 282). Therefore, as distinguished from the south side of the em-

bankment, there were 2 levels of water on the north side of the embankment: one level of water proceeding from the bridge, and the other level of water proceeding from the viaduct which is 11 feet higher than the bridge (R. p. 281). To use a homely expression, the lake south of the embankment during the flood might be likened to a pail full of water with a hole near the bottom representing the railroad bridge, and a hole further up representing the viaduct. Hence, the difference in the elevation of the water north of the viaduct on Wibaux Street and north of the bridge at Lentz's place. The reason for those two levels is obvious: as the water accumulated and impounded south of the embankment, a vast amount was forced through the viaduct.

In regard to accuracy of results obtained by Kutter's formula as used by Mr. Lillis in computing the flow of water 3,000 feet south of the track, 650 feet north of Massey's, at 33,000 cubic feet, Mr. Lyman testified:

> "Q. And have you always explained that the Kutter's formula had to be modified at Massey's in view of this back-water that existed there?
>
> A. There would be no way of modifying Kutter's formula. Your results wouldn't be correct if there was an added height to the back-water there. As to whether that would lessen the amount of flow by the place, will state that if there was back-water, it would give you a larger answer to your problem than would be true if there was none there; and I tried always to explain that whenever it was asked me." (R. p. 791).
>
> "In regard to the accuracy of results obtained by Kutter's formula in such a cross section as the cross section which has been called 'M' during the

testimony of Mr. Lillis, will state that in my opinion, the accuracy would be much greater in a section such as that at Massey's or at Burke's. Explaining why: Kutter's formula is a formula derived—to find the average velocity of the flow through a channel,—channel being more such where the banks are so that the water is in a compact body, more probably for such a channel as an irrigation canal, and the farther it gets away from such a compact, uniform channel, the less reliable and less accurate it becomes." (R. p. 785.)

"I heard the question of one gentleman on the jury to one of the witnesses for the defendant. As to whether there is any reason why that stream, Beaver Creek, on June 7, 1929, from Massey's to First Avenue South, should have been deeper in the valley where the valley was wide, than where the valley was narrow, will state that that reason was the results of back-water from the railroad embankment." (R. p. 786.)

The record shows that many of the witnesses were asked by counsel for Appellant if the water was moving north. This matter is also referred to in Appellant's brief. In this regard Mr. Lyman testified:

"If a lake is created by an obstruction, * * * * and if there is a hole in the obstruction, there is a general movement of all of the water down the lake." (R. p. 303.)

Appellant contends on page 11 of its brief that the high-water mark in 1929 was 2.8 feet below the top of the ties, and the high-water mark in 1921 was 11 feet below the top of the ties, showing that the high-water mark in 1929 was 20.1 feet deep at the bridge and the high-water mark in 1921 was 11.8 feet deep at the

bridge. It will be noted that these depths of the water at the bridge were artificial depths caused by the water being dammed up at the embankment. Had the 1921 flood been of longer duration, there would have been the same depth of water at the bridge as in 1929. The depth of the water at Lentz's, 800 feet north of the bridge, in the 1929 flood was 8½ feet, or 3.3 feet less than the *1921 flood south of the bridge.*

On page 27 of Appellant's brief, under the heading that the railroad embankment was washed out so as to create additional water-ways, will say that the big flood down the valley testified to by Combs, the water maintaining itself at practically the same height at Massey's on the afternoon of the flood, the water 15 feet deep at 2 o'clock in the afternoon 11 miles south of Wibaux where Efta was marooned, the big flood at Nelson's 25 miles south of Wibaux which was at its height at 10 o'clock on the morning of the flood, all this water passed through Wibaux in the afternoon and evening of the 7th and the morning of the 8th of June, 1929, without ever reaching Wibaux Street, due to the sufficient openings in Appellant's embankment left there by nature making openings in the fill.

In connection with the inadequacy of the bridge which Appellant contends on page 40-41 of its brief is not proven, Mr. Lyman testified:

> "Having heard all of the testimony as to the bridge at this trial, having examined the history of the bridge from 1896 to June 7, 1929, as shown in the exhibits of the railway company,—knowing the size and condition of the watershed, and my own

examination of water marks, as to what my opinion is as to the adequacy of the bridge to permit the free flow of such waters as would reasonably have been expected to come to the bridge, will state that in my opinion, the bridge was very inadequate from the day or the time that they filled between the abutments and the piers and, in my opinion, that condition was very evident after the 1921 flood, that those conditions should have been—were self-evident to anyone examining them." (R. p. 786).

"From the testimony that I have heard at this trial about the bridge, its measurements as given by Mr. Clements, the records that have been introduced by the defendant, and my actual survey of the ground around the bridge, you asking as to what I have to say about whether the stream was restored to its original state of usefulness as near as may be, by the bridge that stood over Beaver Creek at Wibaux—the railroad bridge, from 1896 to 1929,—the original condition of usefulness could not have been restored because the great deal of evidence shows the fairly frequent backing up of water by the insufficient bridge opening. In my opinion, that channel undoubtedly, was narrowed by the bridge; I would say it was narrowed from about 170 feet to 65." (R. p. 785-786).

Assuming, but not admitting, that the Appellant employed engineers of recognized ability to plan and construct the bridge, this is not sufficient to release the Appellant from liability. The fact that subsequent experience shows that the bridge did materially obstruct the flow, is evidence that the bridge was not properly constructed regardless of the principles upon which it was built. Heckaman v. Northern Pacific Ry. Co. above cited, 127 Ruling Case Law, 1106; Riddle v. Chicago, M. & St. P. Ry. Co., 128 Pac. 197, a Kansas case.

On page 42-48 of its brief, Appellant contends that there is no evidence of actionable negligence, referring to Subsec. 5, Sec. 6507, Revised Codes of Montana, 1921, hereinbefore cited, and states that the Appellant was justified in violating this statute because it did not owe any legal duty to the Appellee, quoting from Corpus Juris and other cases. The case of Savings Bank v. Ward, 100 U. S. 195, quoted on page 43 of the brief, has no application here. The rule stated in that case, that there was no privity of *contract between* the attorney who examined the title and the bank, and therefore suit did not lie. We have mentioned this decision to show the inapplicability of it to the facts in this case. The other cases cited are of like inapplicability to the facts in this case.

The liability in this case does not depend on privity of contract between the parties to the action, but on the duty of every man to use his own property so as not to injure the person or property of another. The correct rule is stated thus in 22 Ruling Case Law 117. In passing upon the question of legal duty, the Supreme Court of Montana, in the case of Mize v. Rocky Mountain Bell Tel. Co. et al., 38 Mont. 521, 100 Pac. 971, held:

> "It is urged by counsel for appellants that they did not owe any legal duty to Mize. This contention is aptly answered in City Electric St. Ry. Co. v. Conery, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570, a case in many respects similar to the one before us. The street railway company maintained a power line through certain streets in Little Rock. White owned a private tele-

phone line running at right angles to one of the railway company's lines. The private telephone wire came in contact with the power line and received a supercharge of electricity. Conery came in contact with the private telephone wire and was injured. He recovered against the street railway company and White, the owner of the private telephone wire. On appeal by the street railway company the question now before us was raised. The court said: 'The next question is: Upon what duty of the appellant to the appellee can this action be based? The answer to it is: Upon the duty enjoined by the rule which requires everyone to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where an owner of a vicious animal accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. * * * This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross-arms and wires and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property.' (21 Am. & Eng. Ency. of Law, 2d ed., 476.)"

The Appellant further contends that it was not required to anticipate an Act of God, quoting 3 Montana cases on page 42 of its brief. This doesn't relieve the Appellant of liability. Heckaman v. Northern Pacific Ry. Co., supra. In the case of Peel et al v. Chicago, etc. R. R. Co., 94 Mont. 334, 22 Pac. (2d) 617, quoted in Appellant's brief, the court said:

"This case is decided by the application of the principles laid down in the Heckaman Case, supra.

> In each instance due consideration is given to the history of the stream, of the area drained, and of the openings of the embankments. In the Heckaman Case the application of the rules led to an affirmance of the judgment; the application of the same rules in these cases leads to a reversal of the judgments."

Under the heading of proximate cause and concurring negligence set forth on page 48-54 of Appellant's brief quoting several cases, will state that none of those cases have any application to the facts in this case. The Appellant has urged under the heading of actionable negligence and proximate cause, and generally through its brief, that it owed no legal duty to Wagner and that its negligence was not the proximate cause of the injury. Our court has held that the violation of the statute is negligence per se. Westlake v. Keating Gold Mining Co., 48 Mont. 120, 136 Pac. 38.

The evidence in this case clearly shows a causal connection between the negligence of the Appellant and the injuries complained of. The causal connection is shown here by a preponderance of the evidence, and therefore, liability has been established. In the Heckaman case, supra, it is held:

> "The contention of counsel for defendant that, as the defendant is only required to guard against floods reasonably to be anticipated, no liability can result from injury suffered, by reason of an unprecedented storm, regardless of the defendant's negligence, is supported by the cited cases of Kansas City, P. & G. Co. v. Williams, 3 In. Ter. 352, 58 S. W. 570, and Harris v. St. Louis-San Francisco Ry. Co., 224 Mo. App. 455, 27 S. W. (2d) 1072.

However, in each opinion the court pointed out that the damage on which the action was predicated would have been as great had the defendant railway company been guilty of no negligence, which finding would have been a complete defense under all of the authorities. The Williams Case was cited with approval in Lyon v. Chicago etc. Ry. Co., above, but only on the proposition that, if the damage is wholly the result of an act of God, the question of negligence on the part of the defendant corporation becomes immaterial.

"The rule in this jurisdiction is that, where damages are claimed for injuries resulting from one of two causes, for one of which the defendant is responsible, the plaintiff must fail if his evidence does not show that the damage, in whole or in part, was produced by that cause; but where the one is the act of God and the other the culpable negligence of the defendant, the defendant is liable for such loss as was caused by his own act concurring with the act of God. (Raish v. Orchard Canal Co., 67 Mont. 140, 218 Pac. 655). 'If an act of God alone would not produce injury, but, assuming there was an act of God, a plaintiff's loss is made possible by reason of a prior, coincident or subsequent negligent act of a defendant, the latter, is liable, because his act is causa sine qua non.' (Lyon v. Chicago etc. Ry. Co., above; Frederick v. Hale, 42 Mont. 153, 112 Pac. 70; A. M. Holter Hardware Co. v. Western Mortgage & Warranty Title Co., 51 Mont. 94, 149 Pac. 489, L. R. A. 1915F, 835; Walsh v. East Butte Copper Min. Co., 66 Mont. 592, 214 Pac. 641; Jacksonville v. Peninsular Land etc. Co., 27 Fla. 1, 157, 9 South, 661, 17 L. R. A. 33, 65, and notes; 16 Am. St. Rep. 250, note.)"

Appellant in its brief on page 10 under unprecedented flood, and page 30-31 under Act of God, has quoted

the case of Chicago, R. I. & P. Ry. Co. v. Turner, 284 Pac. (Okla.) 855. In this case it was held that the faulty construction and maintenance of the bridge had nothing to do with the damage. However, in the case of Oklahoma Railway Co. v. Boyd, 282 Pac. 587, a case arising out of the same flood as that of Chicago, etc. Ry. Co. v. Turner, supra, the court adhered to the rule stated in the Heckaman case and the Salton Sea cases. Judge Diffendaffer wrote the opinion in both of those cases.

The case of Central Trust Co. v. Wabash, etc. Ry. Co., 57 Fed. 441, is quoted on page 30, 31 & 32 of Appellant's brief under the headings unprecedented flood, Act of God, and no evidence of negligence; Appellant stating that this is a well considered case. In this case the facts were referred to a master who reported to the court recommending that the claims be disallowed. The court held that the master sitting on the case held the same position as a jury, and although in doubt about the master's findings, didn't wish to disturb them.

The case of Berlin Mills Co. v. Croteau, 88 Fed. 860, quoted on page 44 of Appellant's brief under the heading of no evidence of actionable negligence, holds that there is no duty imposed upon an owner to keep his premises in a suitable condition for those who come in solely for their own purposes without any inducement, and therefore the rules of master and servant do not apply. Wagner's goods were not on railroad premises.

In the case of Bray v. Cove Irr. Dist., 86 Mont. 562, 284 Pac. 539, quoted on page 32 of Appellant's brief

under the heading of no evidence of negligence, and on page 44 under no evidence of actionable negligence, will say that the decision in this case was written by Judge Matthews, who wrote the decision in the Heckaman case. A reading of the Heckaman case will find many of the cases urged by Appellant cited. We have noted a few of those cases to show their absolute inapplicability to the facts in this case.

On page 54-62 of its brief, Appellant contends that the damages are not segregated. It contends under this heading as well as all the way through its brief, that all of Appellee's goods were damaged before the water ever reached the embankment, relying upon the testimony of Lillis, its engineer. We have dealt with the question of walls of water fully heretofore in this brief. We will content ourselves with saying, as was said in the case of In re McCue, 261 Pac. 341, 80 Mont. 537:

> "It is true that courts are not compelled to accept as true, merely because someone swears they are true, statements which are so preposterous as not to be entitled to belief by any reasonable person."

The court fully instructed the jury in this phase of the case (R. p. 812-813). In the Heckaman case an instruction embodying these principles was refused, and in passing upon this matter, the Supreme Court in the Heckaman case held:

> " 'If the plaintiff is entitled to damages and the defendant liable for them, the one is not to be denied all damages, nor the other loaded with damages to which he is not legally liable, simply because the exact ascertainment of the proper amount is a

matter of practical difficulty.' The jurors 'must use their best judgment, and make their result, if not an absolutely accurate one, an approximation to accuracy.' (Sellick v. Hall, 47 Conn. 260.)

"If, in a given case, it is conceded or shown that damage would have resulted regardless of the existence of an embankment, but additional damage was suffered by reason of the negligent maintenance of the embankment, the plaintiff must produce evidence as to the amount of damage for which the defendant is liable. (Fort Worth Ry. Co. v. Speer, above.)

"However, the case at bar was not tried on the theory of segregable damages. The contention of the plaintiff was that the injury, in its entirety, was caused by water backed by reason of the insufficiency of the openings in the embankment, while the defendant pleaded and asserted that the damage was caused by a veritable "wall of water" which swept down the creek and engulfed the town of Wibaux before it reached the embankment.

"It was only in defendant's case, after all evidence as to the damage done was in, that the expert Shenehon testified that there would have been, according to his measurements, a foot and a half of water in the Heckaman place had there been no embankment, and the defendant seems to have placed no importance on the testimony. The testimony as to the actual conditions existing at the Massey place, a mile or more above Wibaux, where the relative elevation of the houses and the bottom of the creek correspond to those at Wibaux, but where the valley is much narrower than within the town, tends to refute this expert's computation."

In this case the Appellant contended that the embankment had nothing whatever to do with the damages. Of course, the Appellee contended, and proved by the evidence and physical facts, that there wouldn't have

been any damage to the Appellee's property had it not been for the embankment with insufficient openings therein. The Appellee sued for $15,000 damages; the jury allowed him $5,000. Certainly, they were reasonable in their computations.

On page 67-69 of Appellant's brief, contention is made that the verdict is contrary to the law as given by the court. The instructions of the court have to be construed as a whole (14 Ruling Case Law 817); and a reading of all of the charge of the court (R. p. 801-820) shows that the jury were justified in arriving at their verdict under this charge. Similar instructions were given in the Heckaman trial and sustained by the court in that case.

In connection with the rejection of the Government report mentioned on page 70-73 of Appellant's brief, there is nothing in the report that could aid the jury in any way. The report seems to be based on data obtained from local residents of the town of Wibaux and vicinity and is nothing more than hearsay evidence and is inadmissible. The specification of error does not quote any of the evidence or substance of the report as required by Rule 24 of Federal Appellate Procedure. If there was any matter relevant in this report, it was not segregated (R. p. 322-324) in connection with the introduction of this report.

The record shows that the vicinity of Wibaux and south of Wibaux was surveyed so thoroughly (to defeat this and other law suits arising out of this flood) by the engineers of Appellant, that the report covering

matters in the Little Missouri at Marmath, North Dakota, and other points over an area of several hundred miles, did not clarify or add to the situation. This report was rightly excluded.

On page 73 of its brief, Appellant contends that the 1900 high-water mark at its bridge was erroneous and that at the time of the Heckaman trial it had not checked the matter to determine if this record of the 1900 high-water was correct. With this high-water record before it, why did Appellant wait for a period of 31 years, or from 1900 to 1931, without investigating the matter? This is absolute proof that the Appellant paid no attention to high-water marks or any other notice. It apparently was satisfied as long as its bridge stood up, and it had little concern with the welfare or safety of the people south of its embankment in the town of Wibaux.

This case was fairly tried and properly submitted to the jury. In the Heckaman case, supra, it is held:

> "In determining the sufficiency of the evidence to warrant a verdict, in compliance with the rules of law determining liability, heretofore stated, we are bound by the rule that the jurors are the triers of the facts, and, therefore, a verdict cannot be disturbed if there is, in the record, substantial evidence on which it may be sustained. (Harrington v. Mutual Life Ins. Co., 59 Mont. 261, 195 Pac. 1107; Ball v. Guessenhoven, 29 Mont. 321, 74 Pac. 871; White v. Barling, 41 Mont. 138, 108 Pac. 654; Cohen v. Clark, 44 Mont. 151, 119 Pac. 775.)

The contention of defendant is that if a bridge was sufficient to handle such ordinary high waters as

came before 1929 without damage to property in Wibaux, and particularly to the property where plaintiff had his business in 1929, then, the bridge was sufficient. This is not the law. It was not incumbent upon Appellee to prove damages perpertrated by the 1921 flood and all of the other floods testified to at this trial. As was said in the Heckaman case, supra:

> "The general rule is quoted in Reino v. Montana M. L. D. Co., 38 Mont. 291, 99 Pac. 853, as follows: 'It is not required that the 'specific' injury or 'such' an injury as is complained of was or ought to have been specifically anticipated as the natural and probable consequence of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation; that such consequences might be the natural and probable results thereof, though they may not have been specifically contemplated or anticipated by the person so causing them."

Appellant has set out 3 specifications of error on page 8 of its brief. We have already dealt with specification of error No. 3, in connection with the rejection of Exhibit D-12, the Government report; and damages not segregated, raised in specifications of error No. 1 and No. 2, as appears on page 54 of Appellant's brief; and verdict contrary to law, raised in defendant's petition for a new trial as appears on page 67 of Appellant's brief. We have been unable to find any other errors raised or urged under specifications of error No. 1 and 2 of Appellant's brief, and, therefore, we presume they have been abandoned. Specifications of error

No. 1 and 2 are also contrary to Rule 24 of Federal Appellate Procedure. Nowhere in those specifications does it appear wherein the court erred in overruling defendant's motion for a directed verdict or overruling and denying defendant's petition for a new trial. For these reasons, we will not discuss the assignments of error from page 861-868 of the Record, excepting those we have already discussed.

In connection with the contention of Appellant on page 45-46 of its brief, in that the question of liability in this case is one of general law and that this court is not bound by the decision in the Heckaman case, will state that the theory of Appellee's case is founded on breach of Subsec. 5, Sec. 6507, hereinbefore set out; that this statute has been construed by the Montana Supreme Court in the Heckaman case, a case arising out of the same flood, and Heckaman's property and the Appellee's property are located exactly the same distance from the railroad and on the same elevation with the exception that the Appellee's property was higher as hereinbefore set out. The record in both cases is practically the same, with the exception that the record in this case is stronger than that of the Heckaman case. From a reading of the decision in the Heckaman case, it will be seen that the court gave all of the facts in the case and the law applicable thereto the most careful consideration.

A petition for a new trial in this case was filed with the lower court on May 14, 1934 (R. p. 825), and this matter was argued thoroughly by both sides on August 2, 1934; after more than 7 months' consideration of this

case, the lower court denied the motion on February 18, 1935 (R. p. 837), which shows that Judge Pray gave the facts in this case and the law applicable thereto the most careful consideration.

> "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," (Act of Sept. 24, 1789. Rev. St. paragraph 721.)

The case of New York Central and Hudson River R. R. Co. v. Brice, 159 Fed. 330, 16 L. R. A. (N. S.) 1908, states in the syllabus thereof:

> "The Federal court will follow a state decision as to the duty of a railroad company to fence its tracks for the benefit of others than owners of adjoining land, under a statute of that state."

The statute involved here is a matter within the police power of the state for the general benefit of the community at large. Chicago & R. R. Co. v. Tranbarger, 238 U. S. 678. We believe, therefore, that the decision in the Heckaman case should be controlling in this case.

In conclusion, the evidence in this case shows that the negligent construction of the embankment with insufficient openings therein was not only a contributing cause, but the sole cause of Appellee's damage. The width of the valley between high water marks at Burke's, 2 miles south of Wibaux, was 420 feet, the depth 16.1 feet, the vertical area going through, 4427 square feet. The width of the valley between high water marks at

Massey's was 600 feet, the depth 11.3 feet, the vertical area going through 3774 square feet. About 650 feet north of Massey's or 3,000 feet south of the railroad embankment, where Massey's horses stood, the width of the valley between high water marks was 1700 feet, the depth 13½ feet, the vertical area going through 9290, 2½ times greater than that at Massey's and over twice as much as that at Burke's. The width of the water between high water marks at Appellee's place of business 600 feet south of the embankment, 3,000 feet north of Massey's was 2650 feet, depth from low water 20 feet, depth from bottom of the creek 23 feet, 9 feet higher than at Massey's. Depth of the water 700 feet north of the embankment and viaduct on Main Street 15.5 feet, depth of the water at Lentz's place about 800 feet north of the bridge, 8.5 feet. All these facts coupled with the additional facts that there was no water in Massey's house, no water in Burke's house, and no water in Clem Parker's house, conclusively proves that the sole cause of Wagner's damage was the insufficient openings in the embankment.

We, therefore, respectfully submit that the judgment should be affirmed.

Thomas C. Colton

Lowndes Maury

Attorneys for Appellee.